BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of the Courts Below.

The United States District Court for the Northern District of Illinois, Eastern Division, filed Findings of Fact and Conclusions of Law (R. 421-426). No opinion was reported.

The opinion of the Circuit Court of Appeals for the Seventh Circuit appears in the record at pages 511-517. It is reported in 124 F. (2d) 706.

II.

Jurisdiction.

See Petition for Writ of Certiorari (*supra*, page 4).

III.

Statement of the Case.

The following is a brief statement of the facts as found by the District Court, and not challenged by the Circuit Court of Appeals, which support the petitioner's charges of unfair competition.

1. The Misappropriation of Petitioner's Business System.

The petitioner was the originator and founder of a new and novel idea in the commercial field, namely, the addressing and writing of various data on many business forms in a mechanical manner (R. 68-70). The addressing system consisted of blank metal plates upon

which the information desired to be printed on the various business form is embossed, the machines for embossing the information on the blank plates, referred to herein a embossing machines, and the machines through which the embossed plates passed to transfer the information on the plates to the business form or letter, herein referred to as addressing machines (R. 73).

In order to sell this system the petitioner manufactured and sold the addressing machines and the embossing machines at a price yielding a low margin of profit, a profit which without more would not permit of successful operation by petitioner (R. 73).

The sale of these machines created a market for petitioner's metal plates, not only through the original purchase but for the continuous need therefor as a result of the expansion of the customers' use of the system and the natural increase in the business of the owners of the system (R. 76-77).

Without the business resulting from the sale of these metal plates petitioner would be unable to successfully carry on its business (R. 71-72). The petitioner, over a period of years, has expended large sums of money in advertising and in developing and maintaining extensive sales and service organizations available to the users of its system (R. 78, 82, 83, 86, 87).

The respondent makes no effort to compete by the establishment of a business system of its own, nor by manufacturing and selling competing addressing or embossing machines, but limits its competition solely to the sale of the metal plates used in petitioner's system. Through this method of competition the respondent avoids all expense of the establishment of the system, resulting from the manufacture and sale of the addressing and embossing machines and the expense

of the establishment and maintaining of sales and service organizations, and without expenditure of effort or money on its part, appropriates to its own use the business system and system of distribution built up by the petitioner after great expense, risk and years of painstaking efforts (R. 423).

2. Palming Off Petitioner's Products as Products of Its Own.

On several occasions respondent, after agreeing to sell its products to certain customers, filled said purchase orders with products manufactured by petitioner, without sufficient designation or notice to the customers of such fact (R. 391, 393, 253, 259, 424).

3. Publication by Respondent of Factual Statements Which Respondents Knew to Be False, and Publication by Respondent of Defamatory Utterances Concerning Petitioner, Which Respondent Knew to Be False.

These misrepresentations and defamatory statements were published to a mailing list of 11,000 names (R. 388) and through advertisements in magazines (P. Ex. 6, R. 449 and 79) of general circulation, and by personal letters written direct to owners of petitioner's business system (R. 194, 202, 206, 208, 213, 221).

Respondent stated that it purchased its plate material from the same sources as petitioner, which was untrue, since respondent purchased its plate material from at least three concerns with whom petitioner had never done any business (R. 423).

Respondent claimed its plate material was made according to the same specifications as was petitioner's plate material, which was untrue. Respondent admitted that it had no knowledge as to petitioner's specifications (R. 367), and made no claim that the manufacturers of its plate material, with whom petitioner had done no business, had any knowledge as to petitioner's specifications.

Respondent claimed its plates and petitioner's plates were submitted to the United States Bureau of Standards for comparative tests and that respondent's plates had emerged victorious from such tests (R. 458, 473). This claim was untrue and admitted to be so by respondent (R. 238), since it was shown that the United States Bureau of Standards had made no test whatsoever of either respondent's or petitioner's plates (R. 232).

Respondent charged petitioner was a monopoly and charged monopolistic prices, but offered no evidence in support of these charges, and the record shows that petitioner had substantial and large competitors in this field (R. 97, 111, 112).

Respondent charged petitioner's agents with maliciously tampering with and sabotage of machines of customers who were using plates manufactured by respondent (R. 202-221). Petitioner made full and complete denial of the truth of such charges and no competent testimony in support thereof was offered by respondent.

A more detailed statement of the facts may be found in the District Court's Finding of Fact (R. 421).

IV.

Specification of Errors.

The errors which petitioner will urge if the wirt of certiorari is issued are that the Court of Appeals for the Seventh Circuit erred:

1. In holding that the rule of *Erie Railroad Company* v. *Tompkins,* 304 U. S. 64, is applicable to this case.

2. In holding, contrary to the law of the state of Illinois, in which state the District Court was sitting, that there was no occasion to apply the Illinois law of conflict of laws.

3. In failing to affirm the District Court's decree.

4. In failing to remand the case with instructions that petitioner be permitted to offer further evidence to establish the facts from which it could be determined by what state or states law the controversy should be governed.

V.

Summary of Argument.

1. In actions for unfair competition where the respondent's acts originate in the state of its residence, but fan out, and are consummated in many other states through injury to petitioner in those other states, the rule of the *Erie* case should not be applied and the Federal Court should be left free to render its decision. Any other decision will result in the necessity of the Federal Court examining and applying the laws of each state where an injury was received by reason of the act of unfair competition as a necessary consequence of the application of the law of con-

flicts of laws of the state in which the Court is sitting. This not only imposes upon the Federal Court a most difficult and confusing burden, but will result in a decree which may enjoin the continuance of the respondent's act in some states but refuse to enjoin the same acts in other states.

2. The petitioner is entitled to relief from respondent's tortious acts, and the District Court properly granted such relief.

3. All of the acts complained of admittedly originated through respondent's conduct in Illinois, but the place where the injury therefrom was received by petitioner, or the places where the harm was caused to petitioner, were in states other than Illinois, where petitioner suffered a loss of sales, where respondent's products were used in petitioner's system and where respondent's false statements and libelous utterances were published. These, like other torts which commence in one state and are consummated in another, create a question of conflict of laws. The Illinois law of conflict of laws is that the controversy is governed by the law of the foreign state where the injury was received. The Circuit Court of Appeals was in error in concluding that the controversy was governed by the substantive laws of Illinois.

4. The various acts set forth in petitioner's complaint were all separate and independent of each other, and as such were entitled to separate consideration. The Circuit Court of Appeals, however, refused to give any consideration to the merits of those acts consisting of false factual statements and libelous false utterances, on the theory that those acts were "incidental" to the charge of misappropriation of petitioner's business system, which the Court characterized as the "main" charge. The Court having dismissed the so-called

"main" charge, held that the "incidental" charges must likewise be dismissed.

5. At the time petitioner made its record in this case the *Erie* case had not been decided and the matter of proving all of the states in which respondent had injured petitioner was not important, under the then existing precedents of the Federal common law upon which the District Court found for the petitioner. If the rule of the *Erie* case is to be applied to this case the matter now becomes of great importance—therefore, petitioner should be permitted to re-open the record before the District Court so as to establish as a fact the states wherein respondent's act resulted in injury to it, so that the applicable state or states law can be determined.

ARGUMENT.

I.

The Court Erred in Holding that this Case Was Governed by the Decision of Erie Railroad Company vs. Tompkins, 304 U. S. 64.

The tortious acts committed by the respondent in this case resulted in injuries to the petitioner throughout the United States and Canada, wherever the respondent wrongfully invaded petitioner's system, and circularized and published false and libelous charges. This tortious conduct of respondent was not limited to one injury and one place of wrong, but was a series of successive and continuous tortious acts, resulting in many injuries in the many states wherein petitioner's customers reside.

A similar problem was presented to a Federal District Court in the case of *Chase National Bank* v. *Mobile & Ohio Railroad Co.*, 30 F. Supp. 565 (1939).

In this case the plaintiff was claiming the right under a rule of Federal Court to a preferred claim against the assets of a corporation which was in receivership. It was contended that the plaintiff was not entitled to any such preference under the state law of the state where the court was sitting. The court, in granting the preferred claim, said (p. 568):

> "Under the *Erie R. Co.* v. *Tompkins,* if the law of the state in which the injury occurred is to be applied, how is this court going to do that for the Mobile & Ohio runs through five states. . . .
>
> "Remember that the *Erie* case was construing Section 34, and the last words of that section, after stating that the laws of the states shall be followed say: 'in cases where they apply.'
>
> "I do not think either Section 34 or what is said in *Erie R. Co.* v. *Tompkins* are applicable to the question to be decided by me, so I shall apply the six months rule as laid down by the courts."

In the case of *Illinois Central Railroad Co.* v. *Moore,* 112 F. (2d) 959, the Circuit Court of Appeals for the Fifth Circuit had before it the construction of a railroad union contract. Suit was started in Mississippi and the decision turned upon the construction of the state statute of limitations. The Court refused to follow the state decisions, saying (p. 963):

> "We are of opinion that the doctrine of *Erie* v. *Tompkins, supra,* applies only to local matters governed wholly by State law. A railroad union contract applying over a railroad system which operates in many states is not such. Its meaning and effect ought to be the same in each state."

While this case was reversed in the United States Supreme Court, 312 U. S. 630, it did not turn upon a denial of the above cited reasoning but rather upon a theory which existed long before the *Erie* case, the court saying (p. 634):

> "But even before the decision in *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, the federal courts applied state statutes of limitations in accordance with the interpretations given to such statutes by the states' highest courts. . . . *It was error for the court below to depart from the Mississippi Supreme Court's interpretation of the state statute of limitations.*"*

The difficulties which will arise in unfair competition cases in the Federal Courts if the rule of the *Erie* case is attempted to be applied is pointed out in an article written by Zechariah Chafee Jr. in 53 *Harvard Law Review* 1289, wherein at page 1299 the author says:

> "Most unfair competition litigation takes place in the United States courts, because the parties are apt to be citizens of different states. Since no federal or state statute is usually applicable when the device is incapable of registration, the solution of such cases has been determined by judge-made law. Before the *Tompkins* case the United States judges were free to work out their own solutions in the light of cases in the United States Supreme Court and lower United States courts all over the country. They did not have to follow the decisions of a particular state court, but could apply a general federal law of Unfair Competition. So it made no difference in what particular state the plaintiff adopted his device or the defendant imitated it. Some very able federal judges developed doctrines in this field, notably Mr. Justice Holmes on the Supreme Court and Judge Learned Hand in the Second Circuit in New York City. Their decisions served as precedents for United States judges all over the country. Thus a great body of federal unfair competition law developed continuously and admirably.

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* Emphasis ours throughout this brief.

"This valuable body of law is now likely to be torn into pieces because of the *Tompkins* case, which overturned everything I have described and held that United States judges, in the absence of a pertinent federal or state statute, must take their private law from the decisions of the state courts of the particular state whose law governs the controversy. For example, Judge Learned Hand will henceforth have to draw his doctrines of Unfair Competition from the New York state courts, and his decisions will not be strong authority for another United States judge sitting in Ohio or California. Such a judge must, in his turn, look to Ohio or California state cases. Whatever the merits of the *Tompkins* case in other respects, it seems to me very damaging to the law of Unfair Competition. State litigation in this field is infrequent. Thus, the argument in favor of the result in the *Tompkins* case—that it leads to uniformity in the state and federal courts within a given state—is of slight efficacy when applied to Unfair Competition.

"Moreover, state doctrines have not been continuously developed. Some of the few state cases are decades old, decided before judges understood the problems. There is very little good reasoning on this subject in any single state, as compared with the extensive and admirable body of federal law now apparently doomed to destruction. Massachusetts is more fortunate than some other states, because of the excellent decisions of Mr. Justice Holmes while on the state bench; but some Massachusetts unfair competition cases decided by other state judges will be unhappy precedents for the federal courts in Boston. . . .

"This particularism is out of place in Unfair Competition. Waltham Watches and Baker Chocolate and Yellow Cabs do not stop at state lines, and piratical imitators are equally ubiquitous. In an era of nationwide businesses the Supreme

> Court has suddenly formulated an extreme doctrine of States' rights. So far as Unfair Competition is concerned, the *Tompkins* case makes the United States a legal checkerboard."

The burden of ascertaining the applicable law of each state wherein the act of unfair competition has resulted in an injury, and the confusion resulting from a decree which will enjoin the respondent in some of the states but not in others, makes it desirable that the decision in the *Erie* case be held to have no application in the field of unfair competition.

II.

The Decree of the District Court Should Be Affirmed.

The District Court found that the facts were substantially as alleged in petitioner's bill of complaint (R. 421). These findings of fact were not challenged in the opinion of the Circuit Court of Appeals. On the theory that the case was controlled by the *Erie* case, and on a misapplication of the *Erie* case, the Circuit Court of Appeals was of the opinion that the petitioner's complaint stated no cause of action. In the event this Court agrees with the argument of petitioner that this case should not be governed by the *Erie* case we submit that the decision of the District Court was correct in view of the law thereby made applicable thereto.

1. Misappropriation of Petitioner's Business System.

This is actionable under the decision of *International News Service* v. *Associated Press*, 248 U. S. 215. The principles of that case were affirmed in the later case of *Schecter* v. *United States*, 295 U. S. 495, wherein

Justice Hughes, speaking for the Court, said at page 531:

> "'Unfair competition' as known to the common law is a limited concept. Primarily, and strictly, it relates to the palming off of one's goods as those of a rival trader. *Goodyear Manufacturing Co.* v. *Goodyear Rubber Co.*, 128 U. S. 598, 604; *Howe Scale Co.* v. *Wyckoff Seamans & Benedict*, 198 U. S. 118, 140; *Hanover Milling Co.* v. *Metcalf*, 240 U. S. 403, 413. In recent years its scope has been extended. It has been held to apply to *misappropriation* as well as misrepresentation, to the selling of another's goods as one's own—to *misappropriation* of what equitably belongs to a competitor. *International News Service* v. *Associated Press*, 248 U. S. 215, 241, 242."

Similar relief was granted in the case of *Meyer* v. *Hurwitz*, 5 F. (2d) 370, appeal dismissed 10 F. (2d) 1019.

2. Misrepresentations Concerning Factual Statements, Made by Respondent, Which Respondent Knew to Be False.

The substance and extent of these false statements have heretofore been discussed under Statement of Facts in this brief. That the statements were false and that they were made has been decided by the District Court and not challenged by the Circuit Court of Appeals. The relief as sought by petitioner has been granted in similar cases. See *Motor Improvements, Inc.* v. *A. C. Spark Plug Co.*, 80 F. (2d) 385.

Respondent's Consciously False, Libelous Utterances Concerning Petitioner.

The substance and extent of these libelous utterances ave heretofore been discussed under the Statement of acts in this brief. That these statements were made respondent and were false and libelous has been ecided by the District Court and not challenged by e Circuit Court of Appeals. The charges, as made, ere libelous *per se* (see *Sternberg* v. *Miller*, 170 Fed. 08), and the relief sought by the petitioner in this tion has been granted in similar cases (see *Maytag o.* v. *Meadows Manufacturing Co.*, 45 F. (2d) 299).

III.

he Court Erred in Failing to Examine the Law of Conflict of Laws of Illinois, the State in Which the District Court Was Sitting, to Determine by the Law of What State the Controversy Should Be Determined.

The acts of unfair competition complained of all in-olved conduct of respondent in Illinois, followed by jury to petitioner in states other than Illinois. In e case of the misappropriation of petitioner's busi-ess system the respondent manufactured its products Illinois, which products were thereafter sold to per-ons in other states. When these products were used those persons in other states in petitioner's system e petitioner was injured at that time and place rough the misappropriation and invasion of its sys-m and the consequent loss of sales to that customer that state. In the case of misrepresentation and elous utterances the respondent originated the state-ents in Illinois but caused their publication in other

states. The publication in these states, other than Illinois, caused injury to petitioner in such states.

In all of the above instances the typical case of a tort originating in one state and causing injury in another is readily recognizable. This immediately creates a problem of the choice of law as between the states—a problem more commonly referred to as the law of conflict of laws. Assuming that the *Erie* case applies, then under the decision in *Klaxon* v. *Stentor*, 313 U. S. 487, the Federal Court is bound to find the law of conflict of laws of the state in which it is sitting for the purpose of deciding the law of what state or states shall determine if the complaint states a cause of action. The Court of Appeals made no such finding—if it had done so it would have found that the Illinois courts hold that the law of the state where the injury is received is controlling. See *Hanna* v. *Grand Trunk Railroad Co.*, 41 Ill. App. 116. Since the place that petitioner received its injury was in states other than Illinois the Court of Appeals clearly was in error in finding against petitioner on the theory that under the Illinois law the complaint stated no cause of action.

The Court of Appeals cites no authority for its conclusion that the acts complained of should be controlled by Illinois law, and the decision is clearly contrary to the Illinois law as evidenced by *Hanna* v. *Grand Trunk Railroad Co.*, 41 Ill. App. 116, hereinabove cited.

The error of the Court's reasoning is apparent from the opinion, which reads (R. 516):

> "The wrong, if such it be, was the sale in Illinois for the use indicated."

The Court is erroneously assuming that the state where the wrongdoer acts, without regard to where the injury is received, is the state whose law controls. In the

simple case of A standing in Illinois and throwing a brick into Indiana, striking B in that state, the "wrong," which is the act of A in throwing, occurs in Illinois, but, under the Illinois rule of conflicts of law, as above cited, and under the general law, it is the law of Indiana where B was injured that controls and not the law of Illinois, where the wrongdoer acted.

In addition to the Illinois case above cited we call attention to the following authorities:

Hunter v. *Derby Foods, Inc.*, 110 F. (2d) 970 (C. C. A. 2, 1940). In this case the defendant in New York purchased beef canned in South America, put its label on the product and sold it to retailers in Ohio. Plaintiff's intestate bought the beef in Ohio from the retailer and died from poisoning, claimed to have resulted from consumption of the beef. Here, as in the case at bar, the defendant's acts of labeling and selling were entirely in New York, that is to say, the sale was completed in New York "for the use indicated," while the plaintiff *received injury* outside of New York. In holding that the rights of the parties were controlled by the laws of the state of Ohio the Court said (pages 971-2):

> "the law of the place of wrong governs the right of action for wrongful death . . . It is the same with torts generally . . . Cases where the defendant's conduct occurs in one state, and the injury is done in another, bring in difficulties. See Cook, Tort Liability and Conflict of Laws, 35 Col. L. Rev. 202. In such cases the place of the wrong, the '*locus delicti*', is taken by courts in this country to be the state where the last event necessary to make the actor liable occurs. Restatement of Conflict of Laws, Section 377 and note; . . . In the present instance that place was in Ohio where the deceased ate the food, took sick, and died, and it

> is not necessary to go into finer distinctions between the place of injury and the place of death. *The fact that the defendant's conduct occurred in New York does not oust the law of Ohio.* It sent the food into Ohio where the harm was done. The case is like that of shooting a firearm across the state line, starting a fire which passes the line, or owning a vicious animal which strays over the line . . . By settled rules of conflict of laws, the defendant's liability is measured by the domestic law of Ohio to the same extent as if it had been present and had made the sale there. See *Sheer* v. *Rockne Motors Corporation,* 2 Cir., 68 F. (2d) 942, 944."

Goodrich in "Handbook of The Conflict of Laws" (1927), on page 191, explains the rule as follows:

> "Some difficulty may be encountered in determining the *locus delicti.* Suppose the defendant carelessly does an act in state A which results in harm to the plaintiff in state B. The law of B controls. The plaintiff does not sue the defendant for the latter's negligence, *but because the negligence has caused the plaintiff harm.* The tort is complete only when the *harm takes place,* and it is the law of the state *where this happens* that determines the existence of the plaintiff's claim."

We submit therefore that in this case the petitioner's injuries were received in states other than Illinois, where respondent acted. This creates a problem of conflict of laws. The Illinois law of conflict of laws requires the Court to look to the laws of the state where petitioner received its injuries, to determine the petitioner's substantive rights. This the Court failed to do, and therefore its decision is erroneous.

IV.

The Court of Appeals Erred in Classifying the Charged Acts of Unfair Competition as "Main" and "Incidental." The Misrepresentations in Advertising, the Libelous Utterances, and the Palming Off of Petitioner's Goods as Those of Respondent Were All Separate and Independent Torts and Are in Nowise "Incidental" to Any Other Tort Charged in the Complaint. A Decision by the Court that the Charge of Misappropriation of Petitioner's Business System Was Not Actionable Does Not Relieve the Court of the Duty of Considering the Other Independent Charges of Actionable Wrong Based on Entirely Different Sets of Facts Contained in the Complaint.

The Court has stated in its decision (R. 512-513):

> "Other charges were made against the defendant which we think may properly be termed ancillary or perhaps incidental to the main charge, as follows: (a) Distribution of inferior products to the injury of plaintiff's good will; (b) substitution of plaintiff's plates on orders for defendant's plates in certain instances without notice to customers; (c) misrepresentation as to the character and quality of defendant's plates; (d) improper acquisition of information concerning plaintiff's customers and business, and (e) libel, (1) assertions by the defendant that plaintiff was charging monopolistic prices, and (2) charges by the defendant that plaintiff's service men were guilty of sabotage in an effort to discredit the defendant."

(R. 516):

> "We have also pointed out heretofore that the other alleged offenses, such as libel and misrepresentations were merely incidental to the main charge."

The Court then decided that these separate causes were "incidental" to the "main" cause, and therefore "fell" with the "main" cause (R. 516).

At the outset it is observed that the determination of whether a cause of action is "main" or "incidental" is a determination bearing directly upon the *substance* of a cause of Action. Hence, this Court must, under the *Erie* rule, refer to the substantive law of the appropriate state.

On principal a classification of separate and independent torts into "main" and "Incidental" is patently wrong. Is it the law that if a plaitniff sues a defendant for successive assaults committed on Monday, Tuesday and Wednesday, if proof fails as to Monday's assault but proof is otherwise made as to the assaults on Tuesday and Wednesday, relief is denied as to the two proved torts of Tuesday and Wednesday on the theory that they are "incidental"? And, it may be asked, if such tort causes may be determined as sterile and non-actionable because merely "incidental" to Monday's tort as to which proof failed, what makes such causes "incidental"? Are they "incidental" because they arose later in time than Monday's,—or because they were pleaded secondly, as second and third counts,—or because they were argued with less fervor? Or, are Tuesday's and Wednesday's torts non-actionable as "incidental" to the "main cause" because they involve an allegation of fewer dollars of damage, or because they deal with the defendant using only his fists and not his feet as well, both being allegedly used in Monday's assault which failed for proof?

In the case at bar, as in any other case where a plaintiff sues for damages arising out of several separate

acts of invasion committed by the defendant, each act is a wrong for which the law gives relief. The so-called "incidental" torts occurred at different times and are based on entirely different facts than the so-called "main" tort—they are separate and independent torts and entitled to separate and independent consideration.

Not only did the Court in its decision fail to cite any State Court precedent or any Federal Court precedent to support its alleged rule of "main" and "incidental" classification, but it failed to consider *which* state law with reference to the adoption of the supposed "main" and "incidental" rule would be the appplicable and appropriate law under the *Erie* rule. (See *Klaxon* v. *Stentor,* 313 U. S. 487.)

We have already shown that under the Illinois law of conflict of laws, the controlling state law as to substantive matters is the state where the petitioner was injured—which in his case was not Illinois. In the outline of the subject of unfair competition in *Corpus Juris* (63 C. J. 303) there are listed eighteen classes of actionable causes of unfair competition, to say nothing of the many classes discussed under the heading "Miscellaneous Acts" (see 63 C. J. 465 *et seq.*). Each one of these will alone and without more be non-demurrable. Hence, each act is necessarily looked upon as a separate cause, to be treated as any other cause of separate and independent tort. Each is an unlawful invasion of property rights and damages are awardable. It is evident that the Circuit Court of Appeals is not relying on the law of any state in its characterizing separate acts of unfair competition as "main" and "incidental," and therefore its decision cannot stand.

V.

If the Rule in the Erie Case Applies the Court Erred in Failing to Remand the Case With Instructions that Petitioner Be Permitted to Offer Further Evidence to Establish by the Law of What State or States the Controversy Should Be Governed.

This action was instituted and the record made before the *Erie Railroad* case decision. Under the assumption that the case would be controlled by the "Federal rule" no effort was made to introduce evidence showing the states in which petitioner received injury. In view of the elimination of the "Federal rule" by the *Erie* case and if the decision of this Court is that the *Erie* case controls this case, it now becomes necessary to determine the applicable state law. Following the rule in the *Klaxon* case the applicable state law must be decided by the Illinois rule of conflicts of law. Since the Illinois rule is that the law of the state where the petitioner was injured is the controlling law, it now has become material to show the states where such injury was received. To permit this factual showing this Court should remand this cause to the District Court, as was done in *McGogney* v. *Mutual Life Ins. Co.*, 103 F. (2d) 649. See also *Ruhlin* v. *New York Life Ins. Co.*, 304 U. S. 202.

CONCLUSION.

The decision of the Circuit Court of Appeals is erroneous in that it held that this case was governed by the decision in the case of *Erie Railroad Company* v. *Tompkins,* 304 U. S. 64. If the *Erie* case does not control, the decree of the District Court was clearly correct. If, however, the *Erie* case is controlling, then the decision of the Circuit Court of Appeals is erroneous in that it failed to apply the proper law of Illinois, which was the state in which the District Court was sitting.

We respectfully submit that such a decision should be reviewed by this Court.

Respectfully submitted,

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